

February 26, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L07S0073**

LESLIE SHORT PLAT

Short Plat Appeal

Location: 9902 Second Avenue South, Seattle

Appellant: Peter Leslie
represented by **Rich Hudson**
R and D Enterprises
21936—234th Ave SE
Maple Valley, Washington 98038
Telephone: (425) 432-4806
Facsimile: (425) 660-8700
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King County: Department of Development and Environmental Services (DDES)
represented by **Fereshteh Dehkordi**
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Renton, Washington 98055
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SUMMARY OF DECISIONS AND RECOMMENDATION:

Department's Decision:	Approve short plat, subject to conditions
Department's Recommendation on Appeal:	Deny the appeal
Examiner's Decision:	Grant the appeal in part, and deny in part

EXAMINER PROCEEDINGS:

Hearing Opened:	January 29, 2009
Hearing Closed:	January 29, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES AND TOPICS ADDRESSED:

DDES authority to require, waive or vary a full street overlay.

SUMMARY:

The applicant's appeal of a condition of short plat approval that requires full width street overlays, unless a variance is obtained from the 2007 King County Road Design and Construction Standards (KCRDCS) Section 4.03.1, is granted in part and denied in part.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Applicant/Appellant:	Peter Leslie 3930 Knowles Road Wenatchee, WA 98801
Applicant/Appellant's Representative:	R & D Enterprises Rich Hudson 21936 234 th Avenue SE Maple Valley, WA 98038
STR:	NW 05-23-04
Location:	9902 2 nd Avenue South
Zoning:	R-6
Acreage:	0.31 acre
Number of Lots:	2
Density:	6.4 du/acre
Lot Size:	6,081 and 7,538 square feet
Proposed Use:	Residential Single Family
Sewage Disposal:	Val Vue Sewer District
Water Supply:	King County Water District 20
Fire District:	King County Fire District
School District:	Highline School District
Application Vesting Date:	November 21, 2007

2. The proposed development is intended to subdivide a single residential lot in the Urban Area of unincorporated King County into two residential lots. The existing dwelling unit and driveway are proposed to be retained on the west lot. A second dwelling is intended to be developed on the eastern portion of the property. A separate driveway is planned near the east property line to serve the east lot.

3. The subject property is a corner lot, with street frontages on Second Avenue South and South 99th Street. Both streets are classified as Urban Sub-access Streets. The actual use of both streets is to provide local access to several nearby dwellings. There is no evidence of traffic counts, and no traffic estimates, for either street. The paved travel surfaces of Second Avenue South and South 99th Street adjacent to the property are in generally good condition. However, there are no delineated shoulders.
4. The 2007 KCRDCS were enacted by ordinance number 15753, adopted by the King County Council on May 7, 2007 and approved by the King County Executive on May 17, 2007. The subject application was vested as a complete application on November 21, 2007.
5. On October 17, 2008, King County Department of Development and Environmental Services (DDES) gave preliminary approval to the proposed short plat, subject to a number of conditions. Condition 2 of preliminary approval provided as follows (bold face added by the examiner):

2007 King County Road Design & Construction Standards, (KCRD&CS)

Minimal roadway improvements are required to address access requirements and impacts to existing roads and right-of-way. Engineering plans are not required to address these improvements. Any construction or upgrading of public and private roads shall comply with the 2007 KCRDCS, established and adopted by Ordinance No. 15753, as amended. The proposed short subdivision **shall comply with the KCRDCS including the following requirements, unless otherwise approved by DDES:**

- “A. South 99th Street and 2nd Avenue South are classified as urban subaccess streets (Section 2.03.B). **A 4-foot wide paved shoulder shall be added along the frontage of 2nd Avenue South** (Section 1.05. B and 2.05 A).
- B. A vertical curb shall be installed along the **South 99th Street frontage**. The curb shall extend along the property frontage beginning at the 2nd Avenue South point of curvature. **Alternatively, a 4-foot paved shoulder (and ditch) may be constructed** (Section 2.05 A).
- C. (Not relevant)
- D. The **South 99th Street pavement shall be widened** to 11 feet, measured from the centerline (Section 2.03 B). The minimum overall pavement width shall be 20 feet (1.05 B).
- E. (Not relevant)
- F. (Not relevant)
- G. (Not relevant)
- H. **A full width street overlay is required along both street frontages per KCRD&CS, Section 4.03.1, unless a variance is obtained.**
- I. Modifications to the above road improvement conditions may be considered by King County pursuant to the variance procedures in KCRDCS 1.08. Any request for a road variance shall be submitted to DDES on the appropriate form and with the minimum fee

deposit. Other engineering details that may be shown on the preliminary site plan with the exception of the above may not have been reviewed for compliance with KCRDCS. If differences exist, the final design shall be modified to meet KCRDCS.”

6. The appeal requests that condition 2 H. be reversed. The appellant asserts that the requirement for a full width asphalt street overlay is a discretionary requirement imposed by DDES, which the DDES review engineer may waive or modify, without requiring that the appellant apply for a road variance. The appellant also argues and presented evidence that the full width street overlay requirement is not warranted by the condition of the affected roads or the impacts of the proposed development.

DDES’ response is that condition 2.H is required by the current (2007) King County Road Design and Construction Standards (KCRDCS), which can be varied only by the King County Road Engineer pursuant to the process for obtaining a road variance. DDES did not present any evidence of need to improve the traveled way of either street due to impacts of this proposed development.

7. Earlier in the course of review of the short plat application, the applicant did apply for and obtain a variance from a different requirement of the King County Road Standards that is not relevant to the current issue. The applicant was not aware that a requirement for a full street overlay would be imposed until the applicant received the October 17, 2008 preliminary approval of the short subdivision. The process for seeking and obtaining a road variance is costly and requires substantial time.¹ The King County Department of Transportation has determined that a variance from the requirement for full street overlays cannot be considered by an abbreviated process, such as re-opening the previously approved road variance file.
8. The impact of the proposed development on South 99th Street and Second Avenue South adjacent to the appellant’s property appears to be very slight.² The anticipated cost of providing the full width street overlay along the property frontage is estimated to be approximately \$10,000. Other road improvements required by DDES for this project, which are not in issue, will improve walking conditions on both streets by providing four foot wide paved shoulders along the full property frontage; the South 99th Street pavement is required by condition “2.D” to be widened to 11 feet, measured from the centerline, to provide a minimum overall pavement width of 20 feet; condition “2.C” requires that a power pole near the northeast property corner be relocated to a position not less than 10 feet from the edge of the travel lane; and the applicant must dedicate additional right-of-way at the intersection of South 99th Street and 2nd Avenue South to establish a right-of-way line radius of 20 feet (condition “2.G”).
9. The 2007 KCRDCS addresses “street widening” in Section 4.03. Subparagraphs 1, 3 and 4 provide as follows (bold face added by the examiner):

1. **When an existing asphalt paved street is to be widened**, the edge of the driving lane shall be saw cut to provide a clean, vertical edge for joining to the new asphalt. The existing asphalt may require grinding and/or removal as directed by the Inspector, depending on the condition of the surface and as needed to control surface water flow. **After placement of the new asphalt section, the joint shall be sealed and the street**

¹ Evidence indicated the road variance approval process could cost approximately \$10,000 and take approximately 5 months.

² See findings Nos. 3, 6 and 12. It is generally known in the development industry that ten average daily vehicle trips (5 round trips) is normally attributed to each additional detached single-family residence in a typical traffic analysis.

overlaid with a minimum of 1.5-inch HMA, Class 1/2", plus a prelevel course, **full width throughout the widened area**. All failures and cracking on road surfaces must be repaired prior to the overlay, see Section 4.06. The limits of the overlay will be based on the condition of existing pavement and the extent of required changes to the surfacing and channelization. When the County Road Engineer or Development Engineer determines that potential impacts from a development warrant subgrade repairs prior to the overlay, the applicant must provide a geotechnical report that includes recommendations for repairing the subgrade. **The exception to this requirement must be through the road variance process.**

2. Any widening of an existing roadway, **either to add traveled way, or paved shoulder**, shall have the same surfacing material as the existing roadway.
3. **Any widening or channelization will require a full-width overlay, see paragraph one of this section.**

The foregoing provisions replaced section 4.01.F of the 1993 KCRS. That section provided as follows:

1. When an existing asphalt **paved street is to be widened**, the edge of pavement shall be saw cut to provide a clean, vertical edge for joining to the new asphalt. **After placement of the new asphalt section, the joint shall be sealed and the street overlaid one inch, plus a prelevel course, full width throughout the widened area. The requirement for overlay may be waived by the Engineer or Reviewing Agency** based on the condition of existing pavement and the extent of required changes to channelization.
 2. When an existing shoulder is to become part of a proposed traveled way a pavement evaluation shall be performed. This evaluation shall analyze the structural capacity and determine any need for improvement. Designs based on these evaluations are subject to review and approval by the Engineer or Reviewing Agency. The responsibility for any shoulder material thickness improvement shall be considered part of the requirement for roadway widening. The shoulder shall be replaced in width as specified in Sections 2.02, 2.03 and 2.04.
 3. **Any widening** of an existing roadway, **either to add traveled way or paved shoulder** shall have the same surfacing material as the existing roadway.
10. The King County Road Engineer is an executive officer of the County Department of Transportation, who has the authority to administer and implement the county road standards, including the authority to grant variances from those standards. The development review engineer for this proposal is an administrative officer of the County Department of Development and Environmental Services, who is responsible for the review and approval of road improvements constructed in connection with development permits administered by DDES. When administering prior (1993) KCRS Section 4.01.F, the county road engineer and DDES interpreted the road standards to provide the DDES review engineer with authority to determine when a full width overlay would or would not be required.

When interpreting the current (2007) KCRDCS, the county road engineer has determined that Section 4.03.1. delegates to the road engineer the sole authority to determine when a full width

overlay is or is not required, and that exceptions to the full width overlay requirement can be allowed only through the road variance process. DDES has concurred in that interpretation.

11. Definitions contained within the 2007 KCRDCS make distinctions between areas of the right-of-way, based upon their intended use for vehicular or for pedestrian travel. Terms used are defined in Section 1.16. The following definitions are relevant to this proceeding (bold face added by the examiner):

Pavement Widening (new definition): “Pavement widening projects are **expansion of the roadway surface for vehicular use** and may involve earth work, drainage and paving elements. These projects are considered alterations of the roadway. . .”

Pavement Width: “Paved area on shoulder-type roads or paved surface between curb or gutter flow line on all other roads **as depicted on Drawings 2-001 through 2-003, and 2-005.**”

(The referenced drawings **all show “pavement width” as the area reserved for vehicular travel, distinct from the area reserved for shoulders, sidewalks, curbs and walkways.**)

Road: “A facility serving three lots or more and providing public or private access **including the roadway and all other improvements inside the right-of-way.**

“NOTE: ‘Road’ and ‘Street’ will be considered interchangeable terms for the purpose of this document (KCRS).”

Roadway: “**Pavement width plus any paved or non-paved shoulders.**”

Shoulder: “The paved or unpaved portion of the roadway **outside the traveled way that is available for emergency parking or non-motorized use.**”

Traveled Way: “The portion of a street or road **intended for the movement of vehicles, between curbs or shoulders**, including turn lanes, but **excluding** bike lanes, parking lanes and/or **shoulders.**”

12. The 2007 KCRDCS provide in Section 1.05.B, “Any land development abutting and impacting existing roads shall improve the frontage of those roads in accordance with these standards. The **extent of improvements shall be based on an assessment of the impacts** of the proposed land development **by the reviewing agency.**”

Adding a paved shoulder to the existing pavement width that exists for vehicular use along the appellant’s frontage will, in itself, help the existing pavement width maintain its integrity. There is no evidence of any adverse effect upon the traveled way associated with the construction of paved shoulders where none previously existed.

13. The 2007 KCRDCS contains a section that addresses short plats specifically. That section, in KCRDCS 2.05.A, addresses certain requirements with respect to urban residential short plats that add one additional lot to an existing lot that already has a permitted dwelling unit. The reduced requirements of 2.05.A include substituting a paved shoulder as an alternative to curb, gutter and sidewalk; authorizing a “dead end” access street exceeding 150 feet; authorizing a total roadway width of 20 feet; and applying geometric design criteria applicable to a residential minor access roadway. There is no indication in the road standards or the adopting ordinance that the

requirements of 2.05.A are intended to be the only requirements of the road standards that apply to two lot urban short plats. DDES provided the appellant with the benefit of KCRDCS 2.05.A by authorizing paved shoulders in lieu of curb, gutter and sidewalks along the property frontage.

CONCLUSIONS:

1. The evidence presented indicates that the proposed development will have little, if any, impact on the traveled way³ of South 99th Street or Second Avenue South. However, there is an impact on the public safety from the addition of an additional residence to a neighborhood that lacks safe and adequate pedestrian facilities. The appellant has accepted the need and obligation to construct paved shoulders along the property's entire frontage.
2. This application is governed by the 2007 King County Road Standards, adopted by Ordinance 15753. Section 5.B of that ordinance provides that the extent of improvements required to existing roads "shall be based on an assessment of the impacts of the proposed land development by the reviewing agency." A determination is required to be made by DDES that the proposed development does, in fact, impact the existing roads. In the absence of any impact, frontage improvements are not required by the road standards. Once DDES determines that the abutting roads are impacted, the improvements required must be improvements that address those impacts that this development will have, and the cost of the required improvements must be proportionate to this development's impacts.

If an improvement required by DDES (here, pavement widening) carries with it an ancillary burden or cost, that ancillary burden or cost also should be considered by DDES in making the determination as to whether the required improvements are proportionate to this development's impacts. If a full street overlay is required as a consequence of shoulder construction, the cost of the full street overlay should be considered in determining the proportionality of the cost of the required improvement to the impact anticipated from the proposed development.

3. The appellant is being required to incur substantial costs associated with improvements and the dedication of additional right-of-way for the streets adjacent to this property. The appellant's uncontroverted evidence is that the costs of the required road improvements are disproportionate to the project's impacts.
4. The primary basis for interpreting and applying a statute (or other legislative enactment) is the plain language of the statute, as its terms are defined by that statute. In the King County Road Standards, a "shoulder" is specifically differentiated by the definitions of both the 1993 and 2007 Standards from the paved area of the roadway surface intended for vehicular use. A definition new to the 2007 standards, "Pavement widening projects", is limited to "expansion of the roadway for vehicular use." It is that portion of the roadway (the "traveled way") which is the subject of KCRDCS Section 4.03.1 concerning the widening of a paved street.⁴
5. Although the interpretation of the King County Road Standards by the King County Department of Transportation, Traffic Engineer, and Department of Development and Environmental Services, the agencies that are charged with applying and enforcing those standards, should be

³ The "Traveled Way" is defined as "The portion of a street or road intended for the movement of vehicles, between curbs or shoulders, including turn lanes, but excluding bike lanes, parking lanes and/or shoulders." KCRDCS 1.16

⁴ Section 4.03.3, on the other hand, establishes a requirement concerning surfacing materials "for widening of an existing roadway, either to add traveled way, or paved shoulder."

given substantial consideration, the agency interpretations do not override the language of the standards themselves, using the definitions contained in the standards. The DOT Traffic Engineer and DDES interpretation gives no effect to the definitions of “pavement width” and “pavement widening projects.”

6. For purposes of applying KCRS 4.03.1, the creation or widening of a shoulder (the portion of the roadway outside the traveled way that is available for emergency parking or non-motorized use), does not automatically require that the street be overlayed for its full width throughout the affected area. To the extent that DDES has not required the widening of the roadway surface for vehicular use to address an impact of this project, Section 4.03.1 does not require a full width overlay along that portion of the appellant’s frontage. However, the requirement of condition “2.D” that the South 99th Street pavement be widened, does make that portion of the roadway subject to KCRDCS Section 4.03.1
7. Section 2.05 of the 2007 KCRDCS is not intended to substitute its specific provisions for all of the King County Road Standards that would otherwise be applicable to short plats. The specific requirements of KCRDCS 2.05 should be applied only to those provisions of the road standards that are specifically addressed by Section 2.05. DDES correctly applied KCRDCS Section 2.05 to this proposed development.
8. DDES has the authority to make the determination as to whether this project’s impacts on the existing roads abutting the frontage of the subject property requires a full width overlay, and whether the cost of a full width overlay would be proportionate to the impacts of the proposed development. In making that determination, DDES should not interpret the KCRDCS to require a full width overlay as an automatic consequence of shoulder construction or improvement. When DDES properly exercises its judgment concerning a project’s impacts and the proportionality of the costs of mitigating measures that are required to address those impacts, that judgment is entitled to substantial deference. In this case, the appellant has shown by a preponderance of the evidence that the impact of the proposed development on the traveled way of Second Avenue South will be insignificant. The cost of a full width overlay along the frontage of Second Avenue South, in addition to the other costs of right-of-way improvements and the dedication to be made by the applicant, are not proportionate to the impacts of the development.
9. DDES made an error in law when it determined that KCRDCS Section 4.03.1 requires a full width street overlay along both street frontages, based upon an interpretation that construction of shoulders along the frontages automatically requires a full street width overlay adjacent to the shoulder improvements. Condition “2.H” should be amended to reflect these conclusions.

DECISION:

The appeal by Peter Leslie is granted in part and denied in part, as follows:

Condition 2.H is amended to provide:

“A full width street overlay is required along the frontage of that portion of South 99th Street for which the traveled way is widened, unless a variance is obtained.”

ORDERED this 26th day of February, 2009.

James N. O'Connor
King County Hearing Examiner *pro tem*

MINUTES OF THE JANUARY 29, 2009, PUBLIC HEARING ON DEPARTMENT OF
DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L07S0073

James N. O'Connor was the Hearing Examiner in this matter. Participating in the hearing were Fereshteh Dehkordi, Craig Comfort and Molly Johnson representing the Department; Rich Hudson representing the Appellant and Peter and Shirley Leslie, George Toskey and James Jaeger.

The following Exhibits were offered and entered into the record:

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|-----------------|---|
| Exhibit No. 1 | Department of Development and Environmental Services (DDES) file no. L07S0073 |
| Exhibit No. 2 | Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner dated October 17, 2008 |
| Exhibit No. 3 | Notice of Appeal received November 3, 2008 |
| Exhibit No. 4 | Statement of the Appeal received November 10, 2008 |
| Exhibit No. 5 | Road Variance decision issued August 7, 2008 |
| Exhibit No. 6 | Appeal Report (L08AP018) to the Hearing Examiner dated January 29, 2009 |
| Exhibit No. 7 | Site Plan dated November 20, 2008 |
| Exhibit No. 8 | DDES Witness List dated January 13, 2009 |
| Exhibit No. 9 | Applicant's Witness List received January 22, 2009 |
| Exhibit No. 10A | Photograph of S. 99th St. from corner of 99th & 2nd Ave. S. toward Meyers Way showing quality of road surface |
| Exhibit No. 10B | Photograph directly opposite of driveway to existing home |
| Exhibit No. 10C | Photograph looking down S. 99th St. toward Meyers Way |
| Exhibit No. 10D | Photograph of corner of 2nd Ave. S. showing gutter edging that exists |
| Exhibit No. 10E | Photograph of 2nd Ave. S. looking due north depicting quality of road surface |
| Exhibit No. 10F | Photograph of corner on 2nd Ave. S. & S. 99th St. depicting quality of road surface |
| Exhibit No. 11 | Written testimony from Leslie Shirley |
| Exhibit No. 12 | Letter from George Toskey dated January 23, 2009 requesting a reconsideration of a full overlay of SW 102nd St. |
| Exhibit No. 13 | Vicinity map showing Leslie property, unopened right-of-ways, neighborhood collector route with access road |

JNOC:gao
L07S0073 RPT

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding short plat appeal. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)